BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CAROLE L. ANDERSON (ROMASONTA)
(Claimant-Respondent)

S.S.A. No.

PRECEDENT
BENEFIT DECISION
No. P-B-3
Case No. 67-3234

KATHERINE ANDREWS MEERMANS
(Claimant-Appellant)

Case No. 67-4133

S.S.A. No.

PAMELA McINTYRE LEWALLEN
(Claimant-Appellant)

Case No. 67-4164

S.S.A. No.

UNITED AIR LINES
(Employer-Appellant-Respondent)

Employer Account No.

In Case No. 67-3234, the employer appealed from Referee's Decision No. LA-9214 which held that the claimant was not discharged for misconduct connected with her most recent work and that the employer's reserve account was not relieved of benefit charges. This board received written and oral argument. In Cases Nos. 67-4133 and 67-4164, the claimants appealed from Referees' Decisions Nos. LB-6807 and LA-9847 respectively, which held that the claimants were disqualified for benefits under section 1256 of the code on the ground that they were discharged for misconduct in connection

013-07176 (67-3234)
118-07176 (67-4133)
006-07177 (67-4164)

with their most recent work, and that the employer's reserve account was relieved of benefit charges. These cases have been consolidated for consideration and decision under the provisions of section 5107 of Title 22, California Administrative Code, it appearing that no right of any party is prejudiced thereby.

STATEMENT OF FACTS

The claimants herein had been employed by the above-named employer as stewardesses (flight hostesses). The employer discharged each of them under the circumstances described below.

In October 1965 the employer issued a written notice to the stewardesses, providing, among other things, as follows:

> "It is a condition of stewardess employment that stewardesses remain unmarried. Marriage of a stewardess automatically disqualifies her from the stewardess job. It is the company practice to consider stewardesses who give advance notice of marriage for ground jobs with the Company; however, such other employment is not guaranteed."

In addition to the foregoing, the employer on January 5, 1967 issued a notice entitled CONDUCT, which provided in pertinent part, "MARRIAGE - Stewardesses must remain unmarried."

In a pamphlet provided to new and prospective stewardesses appears the following statement:

> "Here's what we need at United. Why not check your qualifications against the list below. . . . Single . . . the job of a United Air Lines stewardess is so challenging that we require that you remain single throughout your stewardess days."

This pamphlet also indicated that stewardesses were required to be at least 20 years of age.

Although the evidence contains some conflicts, we find that each of the claimants was aware of the company policy concerning marriage. Each of the claimants married during her employment as a stewardess. The claimants did not inform the employer of their marriages because they wished to continue in their employment as stewardesses. The discharge of each came about because of her marriage. The employer alleged misconduct within the meaning of the Unemployment Insurance Code on the ground that the claimants violated company policy.

The claimant in Case No. 67-3234 worked for the employer for five and one-half years until she was discharged on May 6, 1967. She became married on April 17, 1966. She intended to fly as long as possible and did not intend to leave her work after being married.

Before her discharge she had been encouraged to resign. Some mention was made about a ground job. The claimant was informed that if she were transferred to ground work, she would not be able to protest her discharge through her union. The collective bargaining agreement between the employer and the claimant's union is silent regarding the marital status of stewardesses.

Before her marriage the claimant had a poor attendance record. However, on January 26, 1967 her supervisor told her that her attendance record had improved during 1966 and that her work was acceptable. She was not absent from work in 1967.

Because of the claimant's seniority, her flight schedule permitted her to fly from Los Angeles to Chicago and return for a maximum of about 85 working hours per month. The claimant contended that a transfer to a ground job would require her to work a 40-hour week at about the same monthly pay that she was receiving for an 85-hour work month.

The employer's witness testified: "She was released for marriage and for that reason alone." The employer also testified:

> " . . . we do give stewardesses an opportunity to transfer to the ground prior to marriage; however, we have a published regulation

> which forbids a girl to be married, and once they break this regulation by marriage, we feel this is misconduct, and they have wilfully violated a regulation of the company, and therefore they are not eligible for transfer."

The claimant in Case No. 67-4133 was employed for about two years and nine months by the employer, and last worked on April 24, 1967. On October 22, 1966 the claimant was married but did not inform the employer of this fact.

In Case No. 67-4164 the claimant was employed as a flight stewardess for approximately four years - June 27, 1963 to May 1, 1967. Two years before her discharge the claimant was secretly married. She did not thereafter reveal her marriage to the employer. When it was discovered that she was married, she was summarily dismissed by the employer.

Each of the claimants contended that the employer's requirement with regard to unmarried stewardesses was a violation of federal law. The employer contended that inasmuch as there had been no ruling by the Federal Equal Employment Opportunity Commission on the matter, the employer's requirement was proper.

According to the employer's personnel representative who testified at each of the hearings, the two principal reasons for the employer's rule (as argued by the employer before the Federal Equal Employment Opportunity Commission)

> ". . . concern the marketability of our product, the fact that our customers seem to prefer single women, and the fact that many stewardesses after marriage, we feel would have more difficulty keeping up with the unusual working schedule that a stewardess is required to have. I would say that those would be the two largest reasons and of course we realize the fact that this is a subject under discussion. Some air lines have married stewardesses. Others do not. It is possible that eventually United Air Lines may allow married stewardesses to fly, but we are taking the stand and have not yet been overruled by any Federal Court. . . ."

One claimant testified that experience on another air line proved that employing married airline stewardesses did not adversely affect regularity of attendance.

The employer has no such rule with respect to pilots or male stewards.

In Case No. 67-4133, the employer argued that the claimant was discharged not for marrying, but for violating the rule against marrying.

The employer argued to us in Case No. 67-3234 that the discharge was for concealment of the marriage, but the evidence does not establish in any of the three cases that the discharges were for concealment. Although some testimony in Case No. 67-4164 implies that concealment was considered in the decision to discharge, the whole record in that case establishes that the discharge occurred "because /the claimant in that case/ wilfully violated the published company rule," and the rule, which was in evidence, related to marrying, rather than to concealing or reporting that fact. The evidence in all three cases established that, if marriage occurs before transfer to a ground position, the workers are ineligible for transfer because they have violated the rule against a stewardess marrying.

REASONS FOR DECISION

If a claimant is discharged for misconduct connected with his most recent work, then the claimant is disqualified for benefits under section 1256 of the California Unemployment Insurance Code for the period defined in section 1260 of the code; and, under sections 1030 and 1032 of the code, the employer's reserve account may be relieved of charges for benefits which may be paid to that claimant.

The term "misconduct" in this context has been defined by the California Appellate Court in Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P. 2d 947. The court quoted with approval the following language from Boynton Cab Company v. Neubeck (1941), 237 Wis. 249, 296 N.W. 636, 640:

> ". . . the intended meaning of the term 'misconduct' . . . is limited to conduct evincing such wilful or wanton disregard of

> an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

The Boynton Cab case explains its use of this definition by saying:

> "If mere mistakes, errors in judgment or in the exercise of discretion, minor and but casual or unintentional carelessness or negligence, and similar minor peccadilloes must be considered to be within the term 'misconduct', and no such element as wantonness, culpability or wilfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the statute, then there will be defeated, as to many of the great mass of less capable industrial workers, who are in the lower income brackets and for whose benefit the act was largely designed, the principal purpose and object under the act of alleviating the evils of unemployment by cushioning the shock of a lay-off, which is apt to be most serious to such workers."

This definition of misconduct must be considered in the light of the basic purpose of the unemployment insurance program alluded to in the Boynton Cab case. As expressed in section 100 of the Unemployment Insurance Code, this basic purpose is that unemployment benefits are for persons involuntarily unemployed through no fault of their own.

From this definition of misconduct and the emphasis on involuntary unemployment throughout section 100 of the code, it appears that "fault" in this context does not include mere inability, poor judgment, inefficiency, inadvertence, or even "ordinary negligence." As used in section 100, "fault" means intentional action which the person who claims benefits foresees, or which it may be reasonably inferred he must have foreseen, would tend to produce or prolong a period of unemployment and from which a reasonable person in the claimant's circumstances and with the claimant's knowledge and understanding, desiring employment and foreseeing such loss of employment, would necessarily refrain (see Sherman/Bertram v. California Department of Employment (1961), 202 Cal. App. 2d 733, 21 Cal. Rptr. 130).

Misconduct connected with the work then consists of four elements:

(1) A material duty owed by the claimant to the employer under the contract of employment;
(2) A substantial breach of that duty;
(3) A breach which is a wilful or wanton disregard of that duty; and
(4) Evinces a "disregard of the employer's interests," i.e., tends to injure the employer.

Thus, action which violates no duty is not misconduct (compare, for example, Milwaukee Transformer Co. v. Industrial Commission (1964), 22 Wis. 2d 502, 126 N.W. 2d 6).

The duty of an employee is to obey the employer's lawful and reasonable orders within the scope of the contract of employment, but not to "obey further . . . than is consistent with law" (Labor Code section 2856; May v. New York Motion Picture Corporation (1920), 45 Cal. App. 296, 187 P. 785, 788). Wilful violation of the employer's lawful and reasonable order is a breach of duty "like any other breach of contract" (Ehlers v. Langley & Michaels Co. (1925), 72 Cal. App. 214, 237 P. 55, 57).

A basic proposition essential to a clear understanding of these cases is that unemployment insurance laws must be applied in a manner consistent with public policy and other laws (Syrek v. Appeals Board (1960), 54 Cal. 2d 519, 7 Cal. Rptr. 97; Sherman/Bertram v. California Department of Employment (1961), 202 Cal. App. 2d 733, 21 Cal. Rptr. 130; California Unemployment Insurance Appeals Board Benefit Decisions Nos. 6770, 6805, 6812, and 6817).

Congress, the state legislature, and the courts have recognized that not every demand of an employer is a lawful one (Labor Code sections 222.5, 552, 922, 923, 1101, 1102, 1196, 1198, 1199, 1250, 1252, 1292 to 1294, 1350 to 1351, 1391 to 1393, 1420, and 2855; Labor-Management Relations Act of 1947, 29 U.S.C.A. section 141; Lockheed Aircraft Corporation v. Superior Court (1946), 28 Cal. 2d 481, 171 P. 2d 21, 166 A.L.R. 701; Fort v. Civil Service Commission (1964), 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P. 385; Bowling v. Unemployment Insurance Commission (1966), Circuit Court of Lester Co., Civil Case No. 1725, reported in 4 Commerce Clearing House Unemployment Insurance Reporter, "Kentucky," paragraph 8285), even if the employee originally agreed to comply with such a demand (Civil Code section 1676; Labor Code section 2855; DeHaviland v. Warner Brothers Pictures (1945), 67 Cal. App. 2d 255, 153 P. 2d 983; Liberio v. Vidal (1966), 240 Cal. App. 2d 273, 49 Cal. Rptr. 520; Heaps v. Toy (1942), 54 Cal. App. 2d 178, 128 P. 2d 813).

Disobedience to unlawful demands does not constitute insubordination even though the illegality may not have been established by any court before the refusal to obey (Parrish v. Civil Service Commission (1967), 66 A.C. 253, 66 Cal. 2d ___, 57 Cal. Rptr. 623).

Two types of demand in particular concern us here. First, the California legislature has indicated that employers may not lawfully "make any inquiry . . . which expresses, directly or indirectly, . . . any intent to make . . . discrimination" on certain prohibited bases (Labor Code section 1420). Similarly, we have previously recognized that if action based upon certain information is unlawful or against public policy, then there can be no duty to provide that information for the purpose of facilitating such unlawful or undesirable action (Benefit Decision No. 6817).

Secondly, the California Civil Code provides in part:

> Section 1607. "CONSIDERATION LAWFUL. The consideration of a contract must be lawful within the meaning of Section 1667.
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> * * *
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> Section 1667. WHAT IS UNLAWFUL. That is not lawful which is:
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> "1. Contrary to an express provision of law;
> "2. Contrary to the policy of express law, though not expressly prohibited; or
> "3. Otherwise contrary to good morals."

The Unemployment Insurance Code itself describes the general public policy of the State of California against unreasonable job discrimination. Section 2070, relative to older workers, states:

> "It is the public policy of the State of California that manpower should be used to its fullest extent. This statement of policy compels the further conclusion that human beings seeking employment, or retention thereof, should be judged fairly and without resort to rigid and unsound rules that operate to disqualify significant portions of the population from gainful and useful employment. Accordingly, use by employers, employment agencies, and labor organizations of arbitrary and unreasonable rules which bar or terminate employment on the ground of age offend the public policy of this State."

Various other state and federal laws establish public policy against certain kinds of employment discrimination (Labor Code sections 132a, 923, 1101, 1102, 1197.5, and 1420; and 42 U.S.C. section 2000e-2, Public Law 88, 88-352 2d 701, 78 Stats. 253). Accordingly, we have on a number of occasions refused to deny unemployment benefits to persons whose unemployment was initiated or prolonged because of certain job discriminations not based on actual performance (Benefit Decisions Nos. 5641, 5714, and 5934), including the type of discrimination here involved (Benefit Decision No. 6659).

More specifically, California Civil Code section 1676 states as follows:

> "CONTRACT IN RESTRAINT OF MARRIAGE, VOID. Every contract in restraint of the marriage of any person, other than a minor, is void."

This statutory provision applies to an oral contract of employment, as pointed out in Heaps v. Toy, cited above. The court emphasized that this quoted section applies in broad terms to the marriage of "'any person' other than a minor . . . . If the legislature had intended to exempt . . . /someone other than a minor/ it doubtless would have inserted . . . qualifying language to that effect." The court then distinguished ordinary contracts, covered by this statutory restriction, from conditions in gifts, wills, and property settlement and support agreements between husband and wife.

In view of the minimum starting age for stewardesses and the length of the present claimants' employments, we reasonably infer that they were not minors at the times of their marriages. The employer's rule against marriage of its adult stewardesses, under which it discharged the present claimants, therefore, clearly offends the public policy of this state as expressed in section 1676 of the Civil Code. The employer's contention, set forth in one of these cases, that a real distinction exists between discharge for getting married and discharge for violation of a rule prohibiting marriage, is without merit.

The employer contends that the decision with respect to whether or not the no-marriage rule is a proper one belongs with the Equal Employment Opportunity Commission rather than with this board, on the ground that a proceeding is currently pending before that commission regarding the same issue under the federal Civil Rights Act of 1964 (P.L. 88-352, 78 Stat. 265, 42 U.S.C.A. 1981 ff.).

This federal act provides in pertinent part that it is unlawful for an employer to discriminate in hiring or discharge of employees on the basis of sex (section

703(a)(1) of Title VII of the act) unless the basis for the employer's practice is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise (Act section 703(e)(1)).

The applicable federal regulations (29 C.F.R. section 1604.3) provide that a rule prohibiting or restricting employment of married women which does not also apply to married men constitutes discrimination based upon sex and is therefore unlawful under Title VII of the Civil Rights Act, except as limited by section 703 (e)(1), cited above. The regulations further provide (section 1604.1(a)) that the exception based upon a "bona fide occupational qualification" should be narrowly interpreted; and, in particular, that the exception does not extend to a practice based upon the apparent preference of the employer's clients or customers except where necessary for the purpose of authenticity or genuineness, as in the acting profession. As in the state law mentioned earlier, section 1604.6 of the federal regulations prohibits inquiry which "expresses directly or indirectly any . . . /such forbidden/ discrimination . . . ."

While the Equal Employment Opportunity Commission has not yet issued a decision or ruling concerning discrimination against married air line stewardesses, the commission's general counsel declared in opinion letters issued on September 30, 1965 and October 6, 1965 (GC 147-65, GC 212-65, and GC 322-65, cited in C.C.H. Employment Practices Guide Par. 17,251, No. 8-73, November 12, 1965; see also Par. 1210, No. 35-24 and Par. 1219, No. 35-30, January 20, 1967) that any corporate policy or collective bargaining agreement which requires the dismissal of married women is violative of law.

We are concerned here, however, only with qualification for unemployment benefits under state law, not with enforcement of the employment contract as such (see Douglas Aircraft Company v. California Unemployment Insurance Appeals Board (1960), 180 Cal. App. 2d 636, 4 Cal. Rptr. 723, where the employer initiated a termination of employment pursuant to a contract provision relating to pregnant employees). Regardless of whether state law or federal law controls the enforcement of the employment contract in the situations now before us, and

regardless of whether the employer's policy is therefore unlawful under federal law, the Unemployment Insurance Code, which determines whether a claimant is entitled to unemployment benefits, is a law of this state and as such must be construed in the light of the public policy of this state. In defining "misconduct" under state law, we cannot recognize an employee's duty to obey a rule, or to provide an employer with information desired solely for the purpose of enforcing a practice, if such rule or practice is against the public policy of this state. If, however, the employee conceals information solely on the basis of his own judgment that the employer's rule or practice is improper, he acts at his peril; his concealment is misconduct if the rule or practice is in fact not against public policy.

We conclude that the public policy of this state as expressed in its statutes is opposed to unreasonable employment discriminations in general and employment contracts in restraint of marriage in particular. The present employer rule constitutes a contract provision clearly within that description. We therefore cannot regard the claimants' violations of that restraint as "fault" as that term is used in section 100 of the code or as "misconduct" within the meaning of that term as used in sections 1256, 1030, and 1032 of the code. These claimants were therefore discharged for conduct not amounting to misconduct connected with the work under the law.

We need not discuss at length the employer's contention that the claimants could have avoided unemployment by seeking transfer before marriage. To demand that they do so would defeat the legislatively declared public policy described above. We therefore cannot say that their failure to do so either constituted misconduct connected with their work, or that such failure was without good cause if it be argued that the resulting loss of employment was in some indirect sense "voluntary."

While the facts set forth and discussed herein represent a composite of the facts disclosed by the records in each of the cases before us, we have concluded that the record of each case considered separately is sufficient to support the conclusions which we have reached.

We have reached these conclusions after a thorough re-examination of our prior decisions concerning the fundamental issue now before us (Benefit Decisions Nos. 6659, 6726, and 6820; Case No. 66-2092 and other cases). We approve the result reached by us in Benefit Decision No. 6659. We disapprove the views expressed in Benefit Decision No. 6726 and Case No. 66-2092, because a concealed violation of a rule which is contrary to public policy does not constitute misconduct within the meaning of the law.

We reserve judgment on circumstances such as existed in Benefit Decision No. 6820 to a time when similar facts are before us.

DECISION

The referees' decisions in Cases Nos. 67-4133 and 67-4164 are reversed. The referee's decision in Case No. 67-3234 is affirmed. None of these claimants are disqualified for benefits under section 1256 of the code. Benefits are payable to each of them if they are otherwise eligible. Under sections 1030 and 1032 of the code the employer's reserve account is not relieved of charges.

Sacramento, California, February 2, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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